No. 87-642

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES W. LEE, RALPH A. EKLUND
and CORA CARR,

Petitioners,

v.

EKLUTNA, INC., COOK INLET
REGION, INC., UNITED STATES OF
AMERICA, SECRETARY OF THE
INTERIOR, and DIRECTOR,
BUREAU OF LAND MANAGEMENT,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITIONS TO PETITION FOR CERTIORARI

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PETITIONERS' REPLY TO RESPONDENTS' OPPOSITIONS TO PETITION FOR CERTIORARI

Respondents offer no argument or authority in support of the Ninth Circuit of Appeals' theory (809 F.2d 1411) that Petitioners' causes of action for three specified homestead land parcels in the Eagle River Valley, Alaska, were actions against the United States arising under the Quiet Title Act of 1972 ("QTA"), 28 U.S.C. §2409a and time-limited by §2409a(g) thereof. Respondents thus tacitly concede that the Court of Appeals was wrong as a matter of law. Respondents' replies offer an entirely distinct theory which involves claims not pleaded by them, which is illogical, and which is unsupported by statute or by case authority.

The United States' brief in opposition characterizes the issue as

> 2. Whether the United States is an indispensable party to petitioners' suit against the respondent Alaska Native corporations that hold the disputed land under patents issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 et seq., because, under ANCSA, the effect of a judgment in petitioners' favor would be to enable the Native corporations to obtain additional land from the United States.

United States' brief in opposition to certiorari at page (I); emphasis supplied. Respondents' fatal assumption is that if the United States can somehow be made an indispensable party under any theory of joinder, that is enough to lead to dismissal under the Quiet Title Act's statute of limitations. This simplistic argument ignores the fact that joinder of the United States as an indispensable party on Respondents' third-party theory does not make the United States an indispensable party to Petitioners' causes of action.

Respondents' argument ignores the fact that the Ninth Circuit's dismissal was based not simply on the alleged indispensability of the United States under Civil Rule 19 (joinder of persons for just adjudication) but the Court of Appeals' belief that the United States was the essential party defendant which Petitioners must sue for their own lands.

Both Respondents claim that the United States becomes an indispensable party on an indemnity lands theory (Eklutna as a third party plaintiff and the United States as a third party defendant) whereas, in contrast, the Court of Appeals reasoned that the United States was an indispensable party defendant to petitioners' claims for title against Eklutna/Cook Inlet ("Lee, Eklund and Carr can only properly establish their asserted entitlement to the disput-

ed lands in direct proceedings against the United States.". 809 F.2d 1411.). The difference between these two theories is gross. Even if Respondents' theory of the United States' indispensability as a third party defendant is correct, that theory does not make the United States an indispensable party (under the QTA or otherwise) to Petitioners' direct title causes of action against Eklutna and Cook Inlet. Hence 28 U.S.C. §2409a(g) does not apply to Petitioners' claims against Eklutna/Cook Inlet -- the essential basis of the Ninth Circuit's ruling at 809 F.2d 1406.

For that matter, Respondents' third-party theory does not imply that 28 U.S.C. §2409a(g) bars any claims which Eklutna/Cook Inlet may have against the United States for indemnity lands. Eklutna has not identified any accrual

time of such claims but that time could be no earlier than 1979, when Eklutna/Cook Inlet first received patents, i.e., when they first arguably suffered any loss of their lands by reason of their liability to Lee, Eklund or Carr for the Eagle River land parcels. Sabat v. Pennsylvania R. Co., 157 F.Supp. 325, 327 (D.C. N.Y. 1958).

"The running of the statute of limitations on any claims that plaintiff might have against a third-party defendant should have no effect on defendant's right to implead.[citing cases]". Wright and Miller, Federal Practice and Procedure, §1447. Any third party claim which Eklutna/Cook Inlete may have against the United States is not barred simply because Petitioners' alternative causes of action in the district court against the United States may be barred under

§2409a(g). The fact remains that the United States is not an indispensable party to Petitioners' principal causes of action, i.e., their direct title claims against Eklutna/Cook Inlet, for the reasons given in the Petition. See also Tyler v. Judges of the Court of Registration, 179 U.S. 405 (1900). Such claims are therefore not affected by §2409a(g) in the first instance, a point which Respondents do not dispute. See, in a comparable situation, United States v. State of Illinois, 454 F.2d 297, 301 (7th Cir. 1971) (defendant could implead a state even though plaintiffs could not have done so; "We find no sound basis for a contrary result based on the nebulous theory that the original action was 'commenced' by other plaintiffs.".) The bringing in of a third party defendant does not make him a defendant as against

the original plaintiff, but only as against the third party plaintiff. Smith v. Philadelphia Transp. Co., 173 F.2d 721, 724 n.1 (3rd Cir. 1949).

For the purposes of this reply, Petitioners will assume that Eklutna hypothetically would have a valid claim against the United States for such "additional" lands under an indemnity theory and that the United States could be made an indispensable party if Eklutna had asserted against the United States a third party cause of action for such lands. It does not follow from such assumptions that this has the effect of causing the QTA's statute of limitations, 28 U.S.C. §2409a(g) to apply to Petitioners' title causes of action against Eklutna/Cook Inlet. This is clearly established as a matter of federal law. Wright and Miller, Federal Practice and

Procedure, §1447 (emphasizing "importance of carefully distinguishing among different limitation periods in a case involving multiple claims or parties").

Thus, Petitioners' title claims are not time-barred. Respondents did not plead or otherwise assert any third party cause of action for indemnity lands in the district court. This omission was not Petitioners' fault. Had Eklutna/Cook Inlet chosen to do so, they could have asserted these claims in the district court under Rule 19 without prejudicing Petitioners' claims against them. Their failure to do so should not prevent Petitioners from enforcing their equitable rights to the Eagle River lands.

Respondents make other factual and legal assertions. These contentions are not properly before this Court since (1) the court below expressly refused to

reach these issues because of its holding that Petitioners' title claims against the private party defendants were barred by 28 U.S.C. §2409a(g) (809 F.2d 1408) and (2) they are not fairly included within the questions presented for review in this petition for certiorari. Indeed, review of the Ninth Circuit's decision and reversal thereof by this Court would permit this case to be returned to the lower courts so that such courts could address the merits of these questions. However, Petitioners expressly deny that Petitioners entered into any compromises or that there was any "deficit" in their proof of compliance with the homestead laws, 43 U.S.C. §161 et seq. The delay claimed by Eklutna was the direct product of the BLM's misrepresentation of the status of the land and the Secretary's denial of wrongdoing. As a matter of

federal law, moreover, a person is entitled to commence suit against a patentee once the patent is issued to someone else. Since the decision to patent the land to someone rests in the hands of the government, Lee, Eklund and Carr cannot be blamed for the resulting delay. United States v. Schurz, 102 U.S. 378 (1880).

The United States also claims that the United States is a necessary party because the Secretary of Interior's errors are under review. United States' brief in opposition at page 14, note 13. Petitioners note that neither the United States nor any federal officer need be a party for such review to occur. In all cases already cited by Petitioners, e.g., Shepley v. Cowan at 91 U.S. 340 (because the BLM "err[ed] in the construction of the law applicable to

[the] case" Secretary's action "may be reviewed and annulled by the courts when a controversy arises between private parties founded upon [his] decisions") the Secretary's decisions were the subject of review although neither the United States nor the Secretary was a defendant. See in addition, Litchfield v. Richards, 76 U.S. 575 (1870).

The presence of the Secretary as a party, even were it required in the first instance, would not implicate 28 U.S.C. §2409a(g) (the essential basis of the Ninth Circuit's opinion) because the United States claims no interest in the land in dispute between petitioner and private party respondents, Eklutna/Cook Inlet. It is noted that the Ninth Circuit itself has held that there is no time limit on the review of the Secretary's decisions. Coleman v.

United States, 363 F.2d 190, 196 (9th Cir. 1966), United States v. Webb, 655 F.2d 977 (9th Cir. 1981).

Respondents claim that United States v. Midwest Oil, 236 U.S. 459 (1915) and Shiny Rock Mining Corp. v. United States, 825 F.2d 216 (9th Cir. 1987) save the Secretary's 1959 letter from being a misrepresentation of the status of the lands under §24 FPA. Midwest Oil merely held that the Secretary has discretion to withdraw lands temporarily, but not to the extent that a specific statute such as §24 FPA commands otherwise. "Instructions", (Acting Secretary of Interior Ryan) 33 I.D. 104 (1904); see also authorities listed in the following paragraph.

Respondents have not shown that the alleged "tractbook rule" (Shiny Rock) was not satisfied. Moreover, the "tract-

book rule" does not apply where claimants make a contemporaneous demand for the land and where the Secretary disobeys a specific statutory command to accept entry on the land, i.e., he cannot withhold land from homestead entry by a unilateral disobedience of the applicable statute governing the land. See Shiny Rock, supra, and Hannibal & St. Louis R.R. Co. v. Smith, 9 Wall. 95 (1869), Van Wyck v. Knevals, 16 Otto. 360 (1882), United States v. Minnesota, 270 U.S. 181 (1925), Stockley v. United States, 260 U.S. 531, 541 (1922)("It would be manifestly unjust to make the right to a patent dependent upon the administrative action of the register, subjecting it to such delays as are incident to the conduct of public business and over which the claimant has no control"), Ferry v. Udall, 336 F.2d 706, 713 (9th Cir. 1964)

(same), Pecard v. Camens, 4 I.D. 152 (1885)(same).

Lastly, Eklutna states in its brief at page 15, "claimants were represented by legal counsel and refused to appeal adverse decisions". There is no evidence wehatsoever that Eklund or Carr were represented by legal counsel at any time before instituting their district court actions in 1980 and 1982, respectively. Lee was assisted by an attorney in 1963 only as to the determination of the boundary line between the portion of his 160 acre claim inside the alleged power reserve, and the portion outside. See BLM file A034310, district court docket No. 87, memo of July 22, 1963. There is no evidence that Lee's then attorney was ever apprised of the Federal Power Commission's no-injury determination DA-59-Alaska, made pursuant to 16 U.S.C.

§818.

Lee, Eklund and Carr appealed their cases all the way to the Secretary of the Interior in 1959. Exhibit K to part (D) of district court docket No. 108, which led to the letter described at page 5 of the Petition herein. 43 CFR §221.37 (1957) provided that no further appeal would lie from the Secretary's decision.

Eklutna argues that 28 U.S.C. §2409a(g) should not be tolled because it is jurisdictional. This Court has already determined, however, that the Congressional waiver of sovereign immunity should not be construed to narrow the waiver that Congress intended. United States v. Kubrick, 444 U.S. 111, 118 (1979), Bowen v. City of New York, 106 S.Ct. 2022, 2029 (1986). In applying this principle, the Quiet Title Act's statute of limitations should not be ex-

tended to apply to any actions other than those to which Congress clearly contemplated that it apply, namely actions involving claims to land in which the United States claimed an interest. Under this principle, Petitioners' claims clearly are not barred by 28 U.S.C. §2409a(g), however much any third-party claim by Eklutna/Cook Inlet against the United States may be subject to that limitations statute.

Conclusion

For the foregoing reasons this Court should conclude that Respondents are unable to offer any reason in support of the jurisdictional dismissal of Petitioners' title claims by the Ninth Circuit Court of Appeals. Eklutna/Cook Inlet's ability to pursue their indemnity claims if Petitioners' title action is allowed to proceed. On the other hand, the Ninth

Circuit's dismissal grievously injures Petitioners, and the decision announcing that dismissal will stand as a backward step in public lands and federal government litigation in the future. Petitioners submit that this case is appropriate for full review by the Court and respectfully ask that their Petition be granted.

Respectfully submitted this 15th day of January, 1988.

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